Roper Corporation *and* Donald Richard Otto. Case 5-CA-12203

September 15, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On March 4, 1982, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and International Union, United Plant Guard Workers of America,[1] and the General Counsel filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[2] findings,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Roper Corporation, Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Prior to the hearing, the Regional Director for Region 5 granted the Union's motion to intervene in the present proceeding.

[2] We agree with the Administrative Law Judge's determination not to consider the hearsay testimony of statements allegedly made by employee Shan Carroll on the evening before the hearing in regard to positions taken by union negotiator Max McDermott during contract negotiations. In any event, we note that this hearsay testimony would corroborate the testimony relied on by the Administrative Law Judge that during negotiations McDermott asserted that he was opposed to including the system of merit increases in the bargaining agreement.

[3] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] In the absence of exceptions, we adopt *pro forma* the Administrative Law Judge's dismissal of the 8(a)(3) allegations.

[5] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with International Union, United Plant Guard Workers of America (UPGWA), as the exclusive representative of employees in the appropriate unit set forth below by unilaterally changing working conditions or practices without consulting and bargaining with the Union first.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them under the National Labor Relations Act.

WE WILL make whole the employees in the following appropriate unit for any losses they may have suffered by reason of our discontinuing job performance reviews and withholding wage increases from December 1, 1979, until June 2, 1980, with interest. The appropriate unit is:

All plant production security personnel performing plant protection duties as defined in the National Labor Relations Act, employed by the Company at the Baltimore facility, but excluding all other employees and supervisors as defined in the Act.

ROPER CORPORATION

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard in Baltimore, Maryland, on July 31, 1981, on a complaint issued on July 10, 1980, based on a charge filed on May 12 and amended on May 28, 1980. The complaint alleges that, in February, April, and May 1980, Roper Corporation[1] interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the National Labor Relations Act (herein the Act) (a) by telling employees that it could not give wage raises because Respondent and International Union, United Plant Guard Workers of America (UPGWA) (herein the Union), were negotiating, and (b) by telling employees that Respondent had a "beautiful deal" for the employees, but they "blew it" when they voted for the Union; that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against employees, since February, March, and April 1980, by failing and refusing to give them regularly scheduled job performance evaluations

[1] Respondent's name as corrected at the hearing.

and subsequent wage increases because of their adherence to the Union; and that Respondent violated Section 8(a)(5) and (1), since December 1, 1979, by refusing to bargain in good faith by unilaterally, and without notice to or affording the Union an opportunity to bargain thereon, discontinuing its policy of granting regularly scheduled employee job performance evaluations and subsequent wage increases.

The answer to the complaint denies the commission of the unfair labor practices alleged, but admits allegations of the complaint sufficient to justify the assertion of jurisdiction under the Board's present standards (Respondent, engaged in Baltimore, Maryland, in the manufacture and sale of coated metal products, during a recent annual period purchased and received at its Baltimore facility materials and supplies valued in excess of $50,000 directly from points outside the State of Maryland), and to support a finding that the Union is a labor organization within the meaning of the Act.[2]

Upon the entire record in this case, from my observation of the witnesses and their demeanor, and after due consideration of the brief filed by Respondent and the General Counsel's oral argument made at the hearing, I make the following:

FINDINGS AND CONCLUSIONS

I. THE FACTS

This case concerns the failure and refusal of Respondent to grant periodic performance evaluations and consequent merit increases to a small group of guard personnel employed at Respondent's Baltimore facility during the period beginning with the filing of the Union's petition to be certified as the guards' representative and continuing through the negotiations with the Union for a collective-bargaining agreement.

A. *The Representation Proceeding*

The Union filed its petition for representation on July 6, 1979. After an election conducted on August 30, 1979, the Board, on September 19, 1979, certified the Union as the representative of the guard unit.[3] As a result of bargaining negotiations from October 1979 until June 1980, the Union and Respondent entered into a bargaining agreement effective from June 2, 1980, to June 30, 1983.

B. *The Merit Increases*

Prior to the time of the Union's petition, Respondent had a well-established practice of periodically (annually or semiannually) evaluating the job performance of its employees, and, based on that evaluation, granting merit wage increases. The record indicates that it was unusual for an employee not to get an increase on these occasions, ranging from 16 cents to 25 cents per hour, mostly in the upper part of that range.

On advice of counsel, Respondent decided to discontinue these job evaluations and merit increases for guard employees in the appropriate unit as of the date of the filing of the Union's petition for certification. At the time of the petition, the immediate supervisor of the guards, Andrew Eisner, was told to tell the employees that Respondent would not give any evaluations or merit increases because of the filing of the petition. However, there is no evidence that the employees were, in fact, advised of this prior to the start of the bargaining negotiations. Respondent's witnesses also testified that none of the employees were due evaluations or were denied merit increases prior to the start of collective bargaining in October 1979. The General Counsel's complaint, indeed, does not allege that Respondent denied any employee job evaluations or increases before February 1980.

Respondent contends that during the negotiations, the Union approved of withholding merit increases from unit members, based on the testimony of Eisner and Dana T. Schubert, who was then director of industrial relations for Respondent.[4] I do not have much confidence in their testimony on the point. In their efforts to support Respondent's legal position, they seemed less than candid and forthright. But there seems no question that, during negotiations, McDermott quite vigorously asserted that he was opposed to including the system of merit increases in the bargaining agreement, and wanted all the guards treated the same, with fixed wage levels and automatic wage progressions. The final contract appears to carry this out. However, it is also clear that at no time during the negotiations did Respondent notify the Union that it had discontinued the merit increase system, or that employees due performance evaluations and possible wage increases were being denied these benefits while the contract was being negotiated, notwithstanding McDermott's request that no changes in working conditions be made without discussing it with the Union first. I find that the Union was not given reasonable opportunity to bargain on Respondent's discontinuance of the merit increase system during contract negotiations, or its application to specific employees due to be considered for such increases, and did not agree to those actions or approve them.

C. *Statements to Employees*

Guard employee Verna Orlando testified to two conversations with Supervisor Eisner in February 1980 concerning merit raises. In the first conversation, Orlando states that she went into Eisner's office and asked when she would get a raise. She says that Eisner replied that

[2] The Union's petition to intervene in this matter was granted by the Regional Director before the hearing opened, but it did not make an appearance or participate in the hearing.

[3] The appropriate unit is:

> All plant production security personnel performing plant protection duties as defined by Section 9(b)(3) of the Act, employed by the Respondent at its Baltimore, Maryland facility, but excluding all other employees and supervisors as defined in the Act.

[4] The General Counsel presented no witnesses on the issue. However, at the times material to this issue, the Union was represented in the negotiations by Max McDermott, an agent of the Union, and by Shan Carroll, an employee. McDermott has since died. The General Counsel stated that he had been unable to locate Carroll. However, Eisner testified that he had talked with Carroll in Baltimore the night before the hearing, and I permitted him to testify, over the General Counsel's objection, to what Carroll had to say on the issue. This was clearly in error and I have ignored that part of Eisner's testimony, which is hearsay.

he could not help her because Respondent was in negotiations with the Union, adding that "he had a beautiful deal for us, but we blew it by getting the Union in."

On the second occasion, Orlando says she again asked Eisner if she could not get a raise. She said that Eisner answered, "No, his hands were tied because we were negotiating with the Union."

Employee Luther Hampe testified that during the negotiations between the Union and Respondent, one morning when the guards were discussing the fact that the employees at Respondent's Columbia plant had just received a 40-cent raise, and that in the past the Baltimore guards received a raise when they did, Hampe asked Eisner, "Are we going to get our raise?" Eisner replied, "Well, I can't give any reviews right now, or raises right now because of the negotiation."

Hampe also testified that about this same time he asked the then manager of employee relations, Bacon, the same question, and that Bacon "said the same thing, that he couldn't give us any raises at this time."

James Airey, another guard employee, testified to an occasion in late May 1980, during which he discussed with Eisner a raise for himself. He states that, "I knew what Mr. Eisner would say, but Mr. Eisner said he was sorry, but the same as the rest of the men, as long as negotiations was going on, he couldn't give nobody a raise."

Eisner denied that he told Orlando that the guards "had a beautiful deal, but blew it when you got the Union." However, based on the record as a whole and my assessment of the witnesses' credibility, I credit Orlando to the extent that her testimony conflicts with Eisner.

II. ANALYSIS AND CONCLUSIONS

As the General Counsel argues, citing *N.L.R.B.* v. *Benne Katz, et al.*, 369 U.S. 736 (1962); *N.L.R.B.* v. *Allied Products Corp., Richard Bros. Div.*, 629 F.2d 1167 (6th Cir. 1980); *Barko Hydraulics, Inc.*, 225 NLRB 1379 (1976); and *Nucor Corporation*, 230 NLRB 297 (1977), it is well established that, where an employer has an obligation to bargain concerning wages and working conditions, it is a violation of the Act for the employer to unilaterally make changes in employee working conditions, without prior notice to the union, and giving the union a reasonable opportunity to bargain about such proposed changes.

Respondent does not dispute this principle, but argues at length, citing a number of court of appeals opinions, that it should not be required to risk being charged with violating the Act by granting wage increases during this period. But Respondent misapprehends the basic thrust of this case. It is not charged here with violating the Act before the representation election, but only after it was under an obligation to deal with the Union, and thus not to act unilaterally. It could have avoided the "dilemma" it now claims by simply notifying the Union that it intended to discontinue its past practice of periodic wage increases, and to withhold such increases from employees due to be considered for such benefits during the period the parties were in negotiation, and affording the Union a reasonable opportunity to bargain thereon. It is not to be assumed that the Union would have agreed that the employees should not be given wage increases during that period, if they were due, or that Respondent and the Union could not have agreed on the amounts of the raises. In any event, by Respondent's choice, the issue was not brought into focus.

It has long been settled that an employer violates the Act in these situations when the course it chooses, as in this case, necessarily tends to penalize the employees for having chosen a union to represent them, and undermines the union as their representative. See *McCormick Longmeadow Stone Co., Inc.*, 158 NLRB 1237 (1966); *Agawam Food Mart, Inc., et al. d/b/a The Food Mart*, 158 NLRB 1294 (1966). As the court said, in *Armstrong Cork Company* v. *N.L.R.B.*, 211 F.2d 843 at 847 (1954), "Good faith compliance with Section 8(a)(5) and 8(a)(1) of the Act presupposes that an employer will not alter existing conditions of employment without first consulting the exclusive bargaining representative selected by his employees and granting it an opportunity to negotiate on any proposed changes."

Respondent further argues that, during the negotiations, the Union agreed to the discontinuance of the merit review system. But, as previously discussed, the fact that the Union, early on, stated that it did not want the employees' pay tied to a merit review system under the bargaining contract does not justify Respondent's failure to discuss with the Union changes in working conditions it intended to make before the bargaining contract took effect. In a similar situation, in the *Allied Products* case, where the employer unilaterally suspended its merit review program without prior notice to, or consultation with, the union, the Board found that this violated Section 8(a)(5) of the Act, notwithstanding the fact that the employer and the union subsequently discussed this subject during negotiations. See *Allied Products Corporation, Richard Brothers Division*, 218 NLRB 1246 (1975).

Based on the above, and the record as a whole, I find that Respondent, by unilaterally and without consultation with the Union, after December 1, 1979, discontinuing employee job performance reviews and merit increases, violated Section 8(a)(5) and (1) of the Act.

It is also found that, by telling the employees that by bringing the Union in, they had lost benefits that they otherwise might have had, Respondent violated Section 8(a)(1) of the Act.

I have some difficulty with the General Counsel's contention that Respondent's failure to grant merit increases during the time the Union and Respondent were negotiating for an agreement also violated Section 8(a)(3) of the Act. See, e.g., *Shell Oil Company, Incorporated and Hawaii Employers' Council, et al.*, 77 NLRB 1306 (1948); *South Shore Hospital*, 245 NLRB 848 (1979), and cases cited. It may be that these cases are distinguishable from the present case, or are not applicable here. However, I find it unnecessary to resolve those questions inasmuch as the Board has held that a finding that Respondent violated Section 8(a)(5) in these circumstances requires that Respondent restore the *status quo ante*, in any event. See *Allied Products Corporation, supra*. Thus the additional violation would not significantly change the remedy. It

will therefore be recommended that allegations in the complaint that Respondent violated Section 8(a)(3) be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At times material to this proceeding, the Union has been and continues to be the exclusive bargaining representative within the meaning of Section 9(a) of the Act of the employees in the following unit, which is an appropriate unit within the meaning of Section 9(b) of the Act:

> All plant production security personnel performing plant protection duties as defined by Section 9(b)(3) of the Act, employed by the Respondent at its Baltimore, Maryland facility, but excluding all other employees and supervisors as defined in the Act.

4. Respondent, by unilaterally, from about December 1, 1979, to June 2, 1980, without consultation or bargaining with the Union, discontinuing its prior practice of granting employees in the above-described appropriate unit periodic job performance evaluations and merit wage increases, violated Section 8(a)(5) and (1) of the Act.

5. Respondent, by telling employees that they had lost benefits because they had selected the Union as their bargaining representative violated Section 8(a)(1) of the Act.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of the Act, it will be recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent failed and refused to consult with the Union and give the Union a reasonable opportunity to bargain on the issue before Respondent unilaterally discontinued granting employees in the appropriate unit job performance reviews and merit wage increases from December 1, 1979, to June 2, 1980, it will be recommended that Respondent be ordered to make those employees whole for any loss of wages and benefits they may have suffered by reason of Respondent's unilateral action, with interest thereon computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The specific employees affected and the amount of the wage increases may be determined in a compliance hearing, if necessary.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[5]

The Respondent, Roper Corporation, Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain collectively in good faith with International Union, United Plant Guard Workers of America (UPGWA), the Union herein, or any other labor organization which is the exclusive bargaining agent of its employees in an appropriate bargaining unit, by unilaterally altering terms and conditions of employment without consulting the Union, or such other representative of its employees involved, and affording the Union, or such other representative, a reasonable opportunity to bargain on such proposed changes.

(b) Telling employees that they would lose, or had lost, benefits because of employee support for or selection of a bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights protected by the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Make whole the employees in the unit found appropriate in the section hereinabove entitled "Conclusions of Law" for any losses they may have suffered by reason of Respondent's failure to grant job performance reviews and wage increases, with interest thereon, as provided in the section hereinabove entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to the effectuation of the Order herein.

(c) Post at its Baltimore, Maryland, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to any alleged violations of the Act not found hereinabove in this Decision.